Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-324

WILLIAM STEINMAN,

Petitioner,

against

MAURICE H. NADJARI, as Special Deputy Attorney General, JOHN M. MURTAGH, as Justice of Extraordinary Special and Trial Term of Supreme Court, LOUIS J. LEFKOWITZ, as Attorney General of State of New York, and MALCOLM WILSON, as Governor of State of New York,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

BRIEF FOR RESPONDENT NADJARI IN OPPOSITION TO PETITION FOR CERTIORARI

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Preliminary Statement

Petitioner William Steinman seeks a writ of certiorari to review the judgment rendered December 1, 1975 by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, declaring that Article

VI, Section 27 of the New York State Constitution, section 149 of the Judiciary Law of New York and section 63 of the Executive Law of New York, are constitutional and not violative of the Fifth and Fourteenth Amendments of the Constitution of the United States.

On June 10, 1976, the New York Court of Appeals of the State of New York, by memorandum decision, dismissed the appeal taken as right, upon the ground that no substantial constitutional question is involved.

Opinions Below

The opinion of the Supreme Court of the State of New York, Second Judicial Department, is set forth in the appendix to petitioner's brief (1-6a).

. The memorandum decision of the New York Court of Appeals is set forth in the appendix to petitioner's brief (15a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC §1257(2).

Question Presented

Whether Art. VI Section 27 of the New York Constitution, section 149 of the Judiciary Law of the State of New York and section 63 of the Executive Law of the State of New York are unconstitutional.

Statutes Involved

The statutes involved are Art. 6, Section 27 of the New York Constitution, section 149 of the Judiciary Law and section 63 of the Executive Law of the State of New York, and are set forth at pages 2-4 of petitioner's brief.

Statement of the Case

Petitioner, by a complaint dated September 10, 1974, brought an action for declaratory judgment and permanent injunction in Supreme Court, Kings County, against then Special State Prosecutor Maurice H. Nadjari, then Justice John M. Murtagh, Attorney General Louis J. Lefkowitz and then Governor Malcolm Wilson. Specifically, the complaint alleged that Article VI, Section 27, of the New York State Constitution, section 149 of the Judiciary Law, section 63 of the Executive Law, and Executive Order Number 58 are unconstitutional and that the Special Prosecutor had engaged in various acts of misconduct. The complaint sought a judgment declaring the cited provisions unconstitutional and enjoining the prosecution.

The Special Prosecutor moved to dismiss the complaint on the ground that the complaint failed to state a cause of action. The other defendants joined in the motion, and Steinman cross-moved for summary judgment. In an additional affidavit, Steinman alleged that he was irreparably injured in facing the monetary expenses of his federal civil rights action he had previously instituted, criminal trial and appeals.

By a memorandum dated November 25, 1974, the Supreme Court, Kings County (McGrover, J.), granted the defendants' motions to dismiss, holding that a declaratory judgment action "will not be entertained where, as here, a criminal proceeding is already pending, involving the criminal prosecution of plaintiff, in which the constitutional issues with respect to which a declaration of rights is sought in this action may be raised and determined and in which the right of appeal is preserved." On December 23, 1974, judgment was entered dismissing the complaint.

Steinman thereafter sought to appeal from this decision directly to the Court of Appeals, pursuant to CPLR 5601(b)(2). On February 14, 1975, the Court of Appeals dismissed the appeal *sua sponte* "on the ground that the constitutionality of a statute under the State or Federal Constitutions is not the only question involved on the appeal." *Steinman* v. *Nadjari*, 36 N.Y. 2d 684 (1975). On March 20, 1975, the Court of Appeals denied Steinman's application for an order vacating the dismissal of his appeal. *Steinman* v. *Nadjari*, 36 N.Y. 2d 758 (1975).

On December 1, 1975, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, modified the decision of the lower court, and held that Art. 6 Sec. 27 New York State Constitution, Section 149 Judiciary Law and Section 63 Executive Law are constitutional (1-6a).

On June 10, 1976, on Petitioner's appeal taken as right therefrom, to the New York Court of Appeals on constitutional grounds pursuant to Civil Practice Law and Rules 5601(a), the Court dismissed the appeal upon the ground

that "no substantial constitutional question is directly involved * * *" (15a).

Subsequent thereto, the Petitioner pleaded guilty to one count of the indictment, Grand Larceny Second Degree, and on March 19, 1976 was sentenced to pay a fine of $2,000. A Certificate of Relief from Disabilities was issued to Petitioner on April 19, 1976, pursuant to Article 23, N.Y. Correction Law.

No appeal from this conviction and judgment has been filed.

POINT I

The State constitutional and statutory enactments providing for the superseder of a district attorney by the Attorney General and the appointment of an extraordinary special and trial term of the Supreme Court are constitutional.

Petitioner is again asserting his claims that Article VI, Section 27, of the New York State Constitution, section 149 of the Judiciary Law, section 63 of the Executive Law and Executive Order Number 58 are unconstitutional.

Petitioner's first attack is directed at Article VI, Section 27, of the New York State Constitution and its implementing statute, section 149, subdivision 1, of the Judiciary Law, both of which provide that the Governor may, when "the public interest requires," appoint one or more extraordinary special and trial terms of the Supreme Court and may name "the justice who shall hold the term"; further, the Governor "may terminate the assignment of the justice

and may name another justice in his place to hold the term." By this procedure, the Governor, as he did at the same time in the other four counties of New York City, established the Extraordinary Special and Trial Term of the Supreme Court, Kings County, for the trial of cases brought by the Special Prosecutor, and named Mr. Justice JOHN M. MURTAGH to preside at the term. Exec. Order No. 64, 9 NYCRR 1.64. Steinman claims that this procedure allows the Governor to appoint and remove a judge at will and thus violates the separation of powers doctrine of the United States Constitution and the independence of the judiciary. He is wrong.

First, as Petitioner concedes, this Court was faced with precisely the same argument in *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Ct., Kings County*, 46 A.D. 2d 1012 (2d Dept. 1974), *appeal dismissed*, 36 N.Y.2d 911 (1975), *leave to appeal denied*, 37 N.Y.2d 707 (1975), *appeal dismissed*, — U.S. —, 96 S.Ct. 557 (1975). There, in a proceeding brought pursuant to article 78 of the Civil Practice Law and Rules to prohibit Moritt's prosecution, *inter alia*, for the alleged unconstitutionality of the extraordinary term procedure, this Court dismissed the petition "on the merits." In addition, the federal courts in *United States ex rel. Monty* v. *McQuillan*, 385 F. Supp. 1308 (E.D.N.Y. 1974), *aff'd* Docket No. 75-2012 (2d Cir. May 1, 1975), have rejected a similar challenge to the procedure. Specifically, Judge JUDD noted that the procedure does not violate due process standards, for a defendant has no right to a judge of his own choosing or even to a certain method of selecting a judge, as long as the judge is fair and impartial. *Id.* at 1310; *see United States* v. *Keane*, 375 F.

Supp. 1201, 1204 (N.D. Ill. 1974). The court further observed in a statement most appropriate to the case at bar:

> "No substantial charge of actual bias is made against Mr. Justice Murtagh. The general rule is that questions whether it would be improper to sit in a particular case are 'a matter confided to the conscience of the particular judge.' Weiss v. Hunna, 312 F. 2d 711, 714 (2d Cir. 1963), cert. denied, 374 U.S. 853, 83 S.Ct. 1920, 10 L.Ed. 2d 1073, rehearing denied, 375 U.S. 874, 84 S.Ct. 37, 11 L.Ed.2d 104 quoting MacNeil Bros. Co. v. Cohen, 264 F. 2d 186, 189 (1st Cir. 1959). Bias can be charged in any event only on a showing that it stems from an extrajudicial source and results 'in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed. 2d 778 (1966)." *United States ex rel. Monty* v. *McQuillan, supra* at 1311.

The *Monty* case thus vitiates Petitioner's claim that the establishment of an extraordinary term infringes upon the independence of the judiciary in violation of due process. Petitioner fails to rebut the logic of that decision. Moreover, he has in no way shown or even hinted that the Governor who appointed this Extraordinary Term or the many governors who in the past have established similar terms have done so with any purpose other than that prescribed by the statute, *i.e.*, when the public interest requires such action. Indeed, for the Governor to "appoint a judge to do his bidding," as Petitioner fears, would be a "violation of [the] law" under attack. *People* v. *Davis*, 67 Misc. 2d 14, 16 (Sup. Ct., Extraordinary Special and Trial Term, Ontario Co. 1971).

The additional power of the Governor to terminate the assignment and name another justice to hold the term is one of necessity, occasioned by the possibility that a presently assigned justice may become unable or unwilling to continue his position. The Governor has no judicial function or influence in the proceedings. Aside from the power to assign and remove the justice, the Governor "has no power to do more," and he "has not attempted to do more." *Saranac Land and Timber Co.* v. *Supreme Court*, 220 N.Y. 487, 492 (1917). Indeed, he has not yet even removed or replaced any justice assigned to this Extraordinary Term. Ironically, the power which Petitioner complains of most, the power of removing a judge, has not only not been used by the Governor, but Petitioner himself attempted to have it invoked, albeit improperly, in his earlier motion before the Supreme Court, State of New York, Second Judicial Department. *See People* v. *Steinman*, 44 A.D. 2d 839 (2d Dept. 1974). Having already attempted to utilize Article VI, Section 27, of the State Constitution in his favor, it is puzzling that he is now asserting its invalidity.

In short, an extraordinary term is "to be conducted in accordance with the rules of law governing all the other terms of court with the exception of the designation of the judge." *Matter of Reynolds* v. *Cropsey*, 241 N.Y. 389, 395 (1925). The procedure in no way creates a tribunal with a built in personal or pecuniary interest in the outcome of a trial. *Cf. Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *In re Murchison*, 349 U.S. 133 (1955); *Tumney* v. *State of Ohio*, 273 U.S. 510 (1927). Indeed, if the trial judge is unbiased, or if no prejudice is shown, Petitioner would have no reason to complain. *United States ex rel. Monty* v. *McQuillan*, *supra* at 1311; *see Matter of Shakur* v. *Murtagh*, 33 A.D. 2d 901 (1st Dept. 1970), *leave to appeal denied and appeal dismissed*, 27 N.Y. 2d 483, 670 (1970), *cert. denied*, 400 U.S. 948 (1970). And if the judge is biased against Petitioner, the latter has an adequate remedy in the trial court for seeking the judge's disqualification. Judiciary Law §14; 22 NYCRR 33.3(c) (Judicial Conference).

As to Petitioner's additional argument that an extraordinary term violates the federal separation of powers doctrine, the United States Constitution contains no requirement that the structure of state governments conform exactly to the structure of the national government. The federal separation of powers doctrine does not apply to the states:

> "Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in some respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is *for the determination of the state*. And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty." *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) (emphasis supplied).

Cf. United States v. *Brown*, 381 U.S. 437, 442-43 (1965). In truth, all that the Constitution requires of each state is a "Republican Form of Government" [U.S. Const. art. IV, §4], the existence of which here is demonstrated by the fact that the People of the State of New York themselves

voted to adopt the very State constitutional provision under attack. *See* N.Y. Const. art. XIX, §1.

Petitioner's next challenge is to section 149, subdivision 2, of the Judiciary Law, which provides that the Appellate Division, in its discretion, may hear a motion addressed to an extraordinary term. The existence of such discretion, Petitioner argues, diminishes the rights of all litigants before an extraordinary term and thereby denies them equal protection of the law. The same claim was rejected by this Court in *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Ct., Kings County, supra.*

Moreover, the use of sound judicial discretion is not uncommon to either the state or federal courts, as it is employed in decisions on bail, sentence or granting certiorari or leave to appeal. In the same manner, the Appellate Division has discretion to hear a motion before an extraordinary term if the defendant shows a clear need for such action. *Cf.* Criminal Procedure Law §255.20(2). On the other hand, discretion not to hear a motion is often necessary because an appellate court may not have the facilities to pass upon such a motion, especially if an evidentiary hearing is required. *See* Criminal Procedure Law §210.45(6). This was the case with the motion brought by Steinman earlier in the Second Department on a motion to dismiss the indictment, which involved sharply disputed questions of fact. *See People* v. *Steinman, supra.* In any event, the same matters brought before an extraordinary term on a motion may be raised in due course on the judgment appeal in the same Appellate Division which earlier had declined to hear the motion.

Finally, there is no showing that any court in the State of New York, either in Petitioner's or other cases, have practiced invidious discrimination or unreasonable distinctions in deciding whether to entertain a pre-trial motion. *Cf. Williams* v. *Oklahoma City*, 395 U.S. 458 (1969); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Griffin* v. *People of the State of Illinois*, 351 U.S. 12 (1956). The claim is thus without merit.

Petitioner's final constitutional challenge is to section 63, subdivision 2, of the Executive Law, by which the Governor may request the Attorney General or his deputy (in this case, the Special State Prosecutor, pursuant to Executive Order Number 58, 9 NYCRR 1.58, also challenged by Petitioner) to supersede a local district attorney and prosecute a certain case or class of cases. While it is difficult to ascertain the exact basis for the challenge, it appears to be that this provision is invalid because the Special Prosecutor has abused his authority.

This constitutional claim was likewise rejected by this Court in *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Ct., Kings County, supra.* Moreover, the claim is not even an attack upon the statute, but is rather a factual accusation of prosecutorial misconduct. As such, it does not present a constitutional question. Further, the legality of the Attorney General's superseder power is no longer in doubt, as it has been upheld by the courts of the State of New York over the decades. *See, e.g., Matter of DiBrizzi*, 303 N.Y. 206 (1951); *Matter of Turecamo Contracting Co., Inc.*, 260 App. Div. 253 (2d Dept. 1940); Pitler, *Superseding the District Attorneys in New York City—The Constitutionality and Legality of Executive Order No. 55*, 41 Ford. L. Rev. 517 (1973).

In sum, Petitioner's claims are meritless. Had Petitioner not been properly precluded from bringing a declaratory judgment action to bar his pending prosecution, judgment should correctly have been rendered declaring the challenged provisions constitutional.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October, 1976